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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JOSEANTONIO MORENO TERAN, JR., Appellant.	2 CA-CR 2007-0013 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20052182

Honorable Stephen C. Villarreal, Judge

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 Appellant Joseantonio Teran was convicted after a jury trial of three counts of aggravated assault and one count each of assault, criminal damage, driving under the influence of an intoxicant (DUI), extreme DUI, and driving with a blood alcohol concentration of .08 or more. All of the charges arose from a motor vehicle accident in which Teran had been driving his vehicle on the wrong side of the road and hit another vehicle head-on. The trial court sentenced him to concurrent terms of imprisonment on each count, the longest of which is 10.5 years. He argues on appeal that the trial court erred when it admitted inculpatory statements he had made in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and when it allowed the jury to hear prejudicial testimony about the results of a blood test that was later ruled inadmissible. We affirm his convictions and sentences.

¶2 Teran argues the trial court erred when it admitted statements he made to a police officer at the hospital before he was given *Miranda* warnings. We review a trial court's ruling on a motion to suppress for an abuse of discretion, viewing the facts in the light most favorable to the ruling and considering only the evidence presented at the suppression hearing. *State v. Gay*, 214 Ariz. 214, ¶ 30, 150 P.3d 787, 796 (App. 2007). "We review de novo the court's legal conclusions." *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 3, 185 P.3d 135, 137 (App. 2008).

¶3 "In order to be admissible, statements obtained while an accused is subject to custodial interrogation require a prior waiver of *Miranda* rights." *State v. Carter*, 145

Ariz. 101, 105, 700 P.2d 488, 492 (1985). Courts generally examine four factors to determine whether a person was in custody for purposes of *Miranda*: the presence of objective indicia of arrest, the site of interrogation, the length and form of the investigation, and the method used to summon the individual. *State v. Cruz-Mata*, 138 Ariz. 370, 373, 674 P.2d 1368, 1371 (1983).

¶4 As a result of the accident, the Tucson Police Department began a DUI investigation. Officer Frank Hanson testified at the suppression hearing that he was sent to the hospital where paramedics had taken Teran to assist in that investigation. Hanson arrived at the hospital at the same time Teran arrived and "followed the gurney in from outside." Hanson began asking Teran questions after medical personnel had treated him and cleared the room. As part of his medical treatment, Teran was strapped to a backboard during the questioning.

¶5 Hanson stated he did not immediately read Teran the *Miranda* warnings because "[a]t that point, he wasn't under arrest. I was conducting an investigation." Hanson then asked Teran the standard pre-*Miranda* questions he had been trained to ask all DUI suspects. He asked Teran whether he had been drinking, to which Teran replied, "Yes." At some point during the investigation, Teran spontaneously stated that he wanted to die. After Hanson read Teran the *Miranda* warnings, Teran agreed to answer further questions.

¶6 The trial court concluded that, because Teran was "not being held by the police at the hospital for questioning" but was instead receiving "continuing medical

treatment," he was not subject to custodial interrogation and thus his answers had not been obtained in violation of *Miranda*. Accordingly, the court denied Teran's motion to suppress his statements.

¶7 Teran concedes a "majority of Federal Appellate Courts and State Courts have held that a person is not in custody simply because he or she cannot leave the hospital due to his or her medical condition." *See, e.g., State v. Tucker*, 557 A.2d 270, 272 (N.H. 1989) (collecting cases). And here, the state presented evidence that Teran was not physically restrained at the behest of law enforcement but solely for the purpose of receiving medical treatment for his injuries. Teran contends, however, that "[b]eing interrogated about his state of intoxication while at the hospital would clearly constitute a 'compelling atmosphere' to a reasonable person," making *Miranda* warnings necessary. *See United States v. Bautista*, 684 F.2d 1286, 1291 (9th Cir. 1982).

¶8 But that Hanson's questions related to a DUI investigation does not alone render the interrogation custodial. *See Beckwith v. United States*, 425 U.S. 341, 347 (1976). And, although the state concedes Teran was the focus of their investigation, *Miranda* warnings are not required just "because the questioned person is one whom the police suspect." *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977); *accord State v. Hatton*, 116 Ariz. 142, 146, 568 P.2d 1040, 1044 (1977) ("That appellant was a suspect or that the investigation had focused on him when he was questioned does not alone establish custodial interrogation."). Rather, a defendant must show that the questioning occurred while he was

actually in custody. Whether the defendant was in custody is a question a trial court must assess by evaluating whether, under the totality of the circumstances, a reasonable person would believe he had been deprived of his freedom in a meaningful way. *State v. Morse*, 127 Ariz. 25, 28, 617 P.2d 1141, 1144 (1980).

¶9 In this vein, Teran emphasizes Hanson's testimony that Teran had been "in [his] custody" and "was not free to leave." But an officer's undisclosed intent to restrict a suspect's freedom does not demonstrate custodial interrogation for *Miranda* purposes. *Morse*, 127 Ariz. at 29, 617 P.2d at 1145; *cf. Stansbury v. California*, 511 U.S. 318, 324 (1994) ("A police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question whether the individual is in custody for purposes of *Miranda*."). As the trial court found here, no evidence was presented that before reading Teran his *Miranda* warnings, Hanson had expressed his subjective intent to detain Teran. Rather, Hanson asked only questions he had been trained to ask DUI suspects routinely during an initial investigation.

¶10 Teran emphasizes that Hanson arrived at the hospital at the same time as the ambulance, apparently "escorted [Teran] into the Emergency Room," and "stood by" while medical personnel treated him for his injuries. But those actions, standing alone, would not cause a reasonable person to believe he or she was in custody. Hanson did not take Teran to the hospital or ride in the ambulance with him; the officer simply arrived at the hospital at the same time as the ambulance and waited for medical personnel to tend to Teran before

questioning him. No evidence was presented that additional law enforcement officers stationed themselves at Teran's door or that Hanson arranged any kind of treatment schedule with doctors. *See United States v. Martin*, 781 F.2d 671, 673 (9th Cir. 1985) (no custody under *Miranda* when no evidence officers who questioned defendant at hospital were "involved in" or "did anything to extend" hospital stay); *State v. Thomas*, 843 So. 2d 834, 839-40 (Ala. Crim. App. 2002) (defendant not in custody during hospital stay when physically restrained only for medical treatment, no hold placed on him, and not charged with homicide while hospitalized); *State v. DesLaurier*, 630 A.2d 119, 128-29 (Conn. App. Ct. 1993) (defendant not in custody at hospital when police officer "did not bring about or extend the defendant's hospitalization against his will and was not involved in his medical treatment"); *State v. Warner*, 47 P.3d 497, 499-500, 502 (Or. Ct. App. 2002) (although strapped to backboard to treat injuries, DUI suspect not in custody at hospital where no evidence suspect pressured to answer questions or his medical condition made him more vulnerable to questioning).

¶11 Because Teran was physically restrained solely for medical treatment and there was no evidence Hanson took any action that was objectively coercive but only asked Teran a few routine questions, the trial court could have concluded Teran would have reasonably believed he was not in custody. *See State v. Dickey*, 125 Ariz. 163, 168, 608 P.2d 302, 307 (1980) (totality of circumstances considered in custody analysis). Thus, we find no error in the trial court's conclusion that Teran was not in custody when the officer asked him

preliminary investigative questions at the hospital. For that reason, there was no *Miranda* violation, and Teran's statements were admissible.[1]

¶12 Teran next argues the trial court erred by allowing an expert who had not performed the blood test on Teran to testify about the results of that test. On the third day of trial, the state proffered the testimony of Dr. John Treuting, a toxicology consultant for the company that had tested Teran's blood. Because Treuting had not performed the blood test, Teran objected to the prosecutor's questioning him about the results of the test. Teran contended, *inter alia*, that admitting Treuting's testimony would violate Teran's constitutional right to confront the witnesses against him. The trial court reserved its ruling on the admissibility of the testimony but allowed Treuting to testify before the jury because he was from out of state and possibly would not be available later.

¶13 Treuting testified that his employer received a request to test a sample of Teran's blood taken on the night of the accident, "specifically to look for the presence of cocaine." After receiving a positive screening test for cocaine, the laboratory performed a more specific test and determined Teran's blood sample contained a cocaine metabolite, benzoylecgonine. Treuting explained how that metabolite occurs in the human body. He also testified that cocaethylene, which is only formed when a person drinks alcohol and ingests cocaine, was also present in Teran's blood, as was cocaine. He then testified about

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[1]Because we have decided there was no *Miranda* violation, we need not address Teran's contention that, as the result of a first *Miranda* violation, his post-*Miranda* statements were tainted and also should have been suppressed.

the collective effects of cocaethylene, cocaine, and alcohol on the human body. When asked hypothetically about someone using cocaine between 5:00 and 6:00 and having blood drawn at 9:00, Treuting testified the levels of cocaine, cocaethylene, and benzoylecgonine in the person's blood would have been higher before the blood was drawn. He finally testified, based on the test results, that he was certain Teran had used cocaine the same day the blood had been drawn.

¶14 On the fifth day of trial, well after the close of the state's evidence, the court ruled that the results of the blood test were testimonial and Teran's confrontation rights would be violated if the evidence was before the jury. Because the results of the blood test were then stricken and no longer in evidence, the court entered a judgment of acquittal on the charge that Teran had been driving with an illegal drug or its metabolite in his body. On the next day of trial, the court instructed the jury to disregard Treuting's testimony concerning the specific test results but allowed it to consider his testimony about the effects of cocaine on the human body generally.

¶15 Teran now contends the trial court "committed reversible error when it failed to preclude Dr. Treuting's testimony and allowed him to testify before the jury, only to later strike his testimony." As Teran concedes, he did not object when the court admonished the jury to disregard the testimony, request a limiting instruction of his own, or move for a mistrial after the court struck the testimony. He did, however, object when the court allowed Treuting to testify provisionally, reserving the ability to later strike his testimony.

¶16 As best we can understand, Teran appears to contend the trial court's remedy was inadequate to cure the alleged Confrontation Clause violation that occurred when Treuting testified about the results of the blood test. Assuming without deciding that the trial court was correct in concluding that such testimony was inadmissible under *Crawford v. Washington*, 541 U.S. 36 (2004),[2] we can review any such violation for harmless error. *State v. Lamar*, 205 Ariz. 431, ¶ 46, 72 P.3d 831, 840 (2003). Harmless error occurs when we can say beyond a reasonable doubt the error "did not affect or contribute to the verdict." *State v. Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d 1168, 1176 (1998). Teran essentially contends the error he alleges here was not harmless because, by the time the testimony was stricken, the jury would not have been able to disregard the evidence that he had had cocaine and its metabolites in his blood at the time of the accident.

¶17 But Teran himself testified at trial that, around the time of the accident, he had been ingesting cocaine about once a month. On cross-examination, he agreed that, although he did not remember saying it, he must have admitted to Hanson that he had consumed cocaine on the night of the accident. Hanson testified at trial that, after he read Teran his *Miranda* warnings, he began asking Teran questions from a "DUI form." When Hanson asked Teran if he had been using any drugs, Teran stated that he had used cocaine between 5:00 and 6:00 that evening. Thus, Treuting's testimony about the results of Teran's

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[2]This is not a settled question in Arizona. *See State v. Moss*, 215 Ariz. 385, 160 P.3d 1143 (App.), *depublished*, 217 Ariz. 320, 173 P.3d 1021 (2007); *see also Bohsancurt v. Eisenberg*, 212 Ariz. 182, ¶ 1, 129 P.3d 471, 472 (App. 2006).

blood test was cumulative to the extent it established that Teran had ingested cocaine. Finally, we presume the jurors followed the court's instructions to disregard the testimony. *See State v. McCurdy*, 216 Ariz. 567, ¶ 17, 169 P.3d 931, 938 (App. 2007). We therefore conclude that, under the specific circumstances of this case, any error the court committed by allowing the jury to hear testimony that it would later strike did not affect the jury's verdict and was therefore harmless. *See, e.g., State v. Dickens*, 187 Ariz. 1, 19, 926 P.2d 468, 486 (1996); *State v. Lopez*, 217 Ariz. 433, n.2, 175 P.3d 682, 685 n.2 (App. 2008).

¶18 For the foregoing reasons, we affirm Teran's convictions and sentences.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge